

1 EDMUND G. BROWN JR.
Attorney General of the State of California
2 DANE R. GILLETTE
Chief Assistant Attorney General
3 JULIE L. GARLAND
Senior Assistant Attorney General
4 ANYA M. BINSACCA
Supervising Deputy Attorney General
5 STACEY D. SCHESSER, State Bar No. 245735
Deputy Attorney General
6 455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
7 Telephone: (415) 703-5774
Fax: (415) 703-5843
8 Email: Stacey.Schesser@doj.ca.gov

9 Attorneys for Respondent Governor Schwarzenegger

10
11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 **JOHN L. BATIE,**

Petitioner,

15
16 v.

17 **ANTHONY KANE, WARDEN,**

18 Respondent.

C07-2402 MMC

**REPLY TO PETITIONER'S
OPPOSITION TO MOTION TO
DISMISS**

Judge: The Honorable Maxine M. Chesney

19
20
21 **PETITIONER'S CALCULATION OF THE STATUTORY PERIOD IS**
22 **GOVERNED BY 28 U.S.C. 2244(d)(1)(D) AND THEREFORE, HIS**
PETITION IS UNTIMELY AND SHOULD BE DISMISSED.

23 Petitioner submitted an Opposition to Respondent's Motion to Dismiss stating that
24 subparagraph (A) should be applied in calculating his one-year statute of limitations.
25 Respondent contends that pursuant to *Redd v. McGrath*, 343 F.3d 1077 (9th Cir. 2003),
26 subparagraph (D) controls and that based on the calculations submitted in Respondent's Motion
27 to Dismiss, Petitioner failed to file his federal habeas claim in a timely matter. Accordingly,
28 Respondent respectfully requests that his Petition be dismissed as untimely under 28 U.S.C. 2244

Respondent's Reply to Petitioner's Opposition to Motion to Dismiss

Batie v. Kane
C07-2402 MMC

1 (d)(1)(D).

2 In *Redd v. McGrath*, the Ninth Circuit determined that subparagraph (D) applies when
3 determining the date on which the one-year statutory period begins to run for federal habeas
4 claims challenging parole determinations. *Redd*, 343 F.3d at 1080. The Court held that under
5 this subparagraph, the limitations period begins to run when the “factual predicate” of an
6 inmate’s habeas claim, “could have been discovered through the exercise of due diligence.” *Id.*
7 (quoting 28 U.S.C. § 2244(d)(1)(D).) Although Petitioner advances that subparagraph (A)
8 should apply, the Court rejected this argument, noting that subparagraph (A) uses the word
9 “judgement,” which refers to the judgment of the prisoner’s criminal conviction and does not
10 apply to administrative decisions. *Id.* at 1081. On the other hand, subparagraph (D) is proper
11 because it determines that the factual predicate of habeas claims challenging parole
12 determinations is the date on which the inmate could have learned of the administrative decision
13 he was challenging. *Id.* at 1084. Therefore, subparagraph (D) is the proper section to apply to
14 petitions containing parole denials.

15 ///

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 In the case at bar, the date on which Petitioner could have learned of the denial of parole by
 2 the Governor is the date on which the letter was faxed to him: May 19, 2005. This date serves as
 3 the factual predicate for calculating the statute of limitations, with the period commencing the
 4 next day on May 20, 2005. *Redd*, 343 F.3d at 1084. Accordingly, the starting date for
 5 determining whether Petitioner filed in a timely matter is May 20, 2005 and the statute of
 6 limitations was correctly calculated in Respondent's Motion to Dismiss. For the reasons stated
 7 herein and in Respondent's motion to dismiss filed July 30, 2007, this Court should grant the
 8 motion.

9
 10
 11 Dated: September 4, 2007

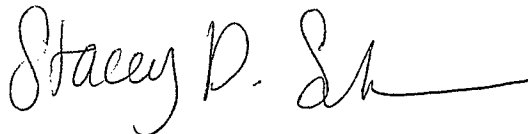
12 Respectfully submitted,

13 EDMUND G. BROWN JR.
 Attorney General of the State of California

14 DANE R. GILLETTE
 Chief Assistant Attorney General

15 JULIE L. GARLAND
 Senior Assistant Attorney General

16 ANYA M. BINSACCA
 Supervising Deputy Attorney General

17
 18
 19 

20 STACEY D. SCHESSER
 Deputy Attorney General
 Attorneys for Respondent

21
 22
 23 20102761.wpd
 24 SF2007200469

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Batie v. Kane**

No.: **C07-2402 MMC**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 4, 2007, I served the attached

REPLY TO PETITIONER'S OPPOSITION TO MOTION TO DISMISS

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

John L. Batie
C-34674
Correctional Training Facility
P.O. Box 686
Soledad, CA 93960-0686
in pro per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 4, 2007, at San Francisco, California.

L. Santos

Declarant

L. Santos

Signature